IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

No. 83-6297

JUNE UNDERWOOD (LAMPKIN)

Appellant

vs.

STATE OF OHIO, et al.

Appellees

On Appeal From The
Supreme Court of the State of Ohio

MOTION TO DISMISS OR AFFIRM

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL

STEPHEN P. SAMUELS
Assistant Attorney General
Court of Claims Defense Section
State Office Tower, 17th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-7447

ATTORNEY FOR APPELLEES

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STATEMENT OF THE CASE

This case was brought by Appellant June Underwood in the Ohio Court of Claims under the authority of Chapter 2743, Ohio Revised Code. Appellant's Complaint named as Defendants the State of Ohio, the Ohio Department of Mental Hygiene and Corrections, Longview State Hospital, the Ohio Department of Education, the Hamilton County Welfare Department, Governor James A. Rhodes, and the Ohio Department of Public Welfare. The Court of Claims subsequently dismissed Governor Rhodes and the County Welfare Department, and Appellant's Motion for Three Judge Panel was overruled on the grounds that Appellant failed to show that her claim presented novel or complex issues of law or fact.

Subsequent to a trial and the submission of Briefs, an Opinion containing findings of fact and conclusions of law was filed on February 5, 1980. The opinion was followed by a Judgment Entry dismissing the action. A Motion for a New Trial was overruled by Opinion and Entry dated September 10, 1982.

On June 28, 1983, the Franklin County Court of Appeals affirmed the decision of the Court of Claims, overruling all six assignments of error. The Court of Appeals determined that there was sufficient evidence to support the findings of the trial court.

The Supreme Court of Ohio, by entry dated October 19, 1983, declined to hear the case and denied Appellant's Motion to Certify the record of the Court of Appeals. From this entry

Appellant has filed her "Jurisdictional Statement and/or Petition For A Writ Of Certiorari" with this Court. However, Appellants do not contend that any Ohio statute is in conflict with the Constitution of the United States. Therefore, the following Memorandum is presented as a Motion to Dismiss the appeal and affirm the decision below or, if appropriate, in opposition to the issuance of a writ of Certiorari.

STATEMENT OF FACTS

Because Appellant's Statement of Facts contains numerous "facts" that are unsupported or contradicted by the record, Appellees are obliged to relate the facts as found by the Court of Claims and supported by actual testimony.

Appellant was born on May 31, 1956, while her mother was a patient at Columbus State School. She was raised in a series of foster homes and with grandparents. By 1965, at the age of nine, she had already exhibited a number of behavioral problems, including anti-social conduct and the fabrication of sexual stories.

On June 21, 1965, Arthur Underwood, Appellant's stepfather, signed an affidavit alleging that Appellant was mentally ill. The Probate Court of Hamilton County issued an Order of Detention to the Sheriff. June was examined at Longview State Hospital, and certificates were filed by two physicians stating that probable cause existed that Appellant was mentally ill. On August 5, 1965, Appellant was referred by the Probate Court to Longview for a period not to exceed ninety days. By further Order of the Probate Court dated October 28, 1965, Appellant was ordered to remain at Longview for an "indeterminate hospitalization," with a diagnosis of transient situational personality disorder "adjustment reaction of childhood."

Although Appellant claims that she was denied the opportunity to see or communicate with her family, from November 24, 1965, to October 8, 1966, June signed out of

Longview with her mother or stepfather a total of thirty-one times. During her hospitalization, she was absent with leave 217 days.

Early psychiatric examinations of Appellant, along with the administration of numerous psychological tests, concluded that she used conscious fantasy to a great extent, had behaviorial problems, and displayed anxiety, evasion, and possible hallucinations. She was determined to be "a very disturbed child, though not psychotic."

Appellant was enrolled in the Longview Unit School from August, 1965, through July, 1968, which was under the supervision of the Cincinnati Board of Education, and was for children placed in children's wards. Thus, Appellant's assertion on page 10 of her Jurisdictional Statement that she only attended the school one and one-half years is in error.

Throughout her Statement of Facts, Appellant includes "testimony" which is not supported by the record. For example, on page 9 of Appellant's Jurisdictional Statement, the following statement appears:

> June Anderson (a social worker for the Hamilton County Welfare Department) testified that, but for the fact that June was forgotten at Longview (by the Welfare Department) she too would have been placed in the same foster home.

First, Appellee notes that nowhere in Ms. Anderson's testimony does she state either (a) that the County Welfare Department "forgot" about June, or (b) that June would have been placed in the same foster home as her siblings. Ms. Anderson's

actual testimony indicates that the County Department closed its case on June when she entered Longview. Further, Ms. Anderson testified that in 1967, Longview made a request of the Hamilton County Welfare Department to find a foster home for June, which request is documented in a letter to the Job Corps. Thus, Appellant's own witnesses contradict the "facts found in the "Statement of Facts" portion of her Memorandum in Support.

Likewise, Appellant's statement on page 10 that "Dr. Lagan's testimony . . . was that during the majority of June's time in Longview she was housed in adult wards . . .," is clearly not supported by the record. Dr. Lagan listed the wards June was placed in throughout her stay in Longview, and indicated that she was in either the children's ward or adolescent wards from August, 1965 through August, 1970 a period of five years. Dr. Lagan also did not testify, as Appellant claims, that June did not need further hospitalization following her escapes. In fact, Dr. Lagan stated that <u>if</u> there was no psychiatric reason for June being at Longview, she would have been discharged. In addition, Appellant misrepresents the testimony of Dr. Lagan regarding the use of medication at Longview. Dr. Lagan never testified that the medication June received was either excessive or unnecessary, and there is no testimony in the record that June was ever administered any non-approved drugs. Apppellant here is referring to the drug Depo-provera, and Appellees note that

the only evidence with regard to this drug points to the fact that Appellant was never administered Depo-provera. Dr. Lagan testified that Defendant's Exhibit 7 was the only list of patients at Longview to have received the drug, and June's name is not on that list.

Appellant continues on page 10 to paint a picture of Longview which is not supported by her own witnesses. Appellant's description of June's living quarters as a room "furnished with a mattress on the floor and sometimes with a tin can into which she could relieve herself" is grossly misleading. As testimony indicated, quiet rooms are designed with the safety of the patient in mind. In fact, Mr. Nick Seta described a quiet room and the importance of not placing a toilet in one for the safety of the individual. He noted that "you allow the individual to go to the bathroom. They are checked every ten(10) minutes." Once again, the "Statement of Facts" of Appellant clearly distorts the testimony adduced and includes numerous "facts" which simply do not exist.

The apparent lack of familiarity with the facts on the part of counsel for the Appellant results in the appearance of validity for its "Statement of Facts," which contain numerous references to testimony which, upon inspection, have nothing to do with the purported facts. For example, on page 11 of her Jurisdictional Statement, Appellant states:

> She was refused entrance by schools throughout our country, and prospective employers, including the government refused her employment because of her Longview detention and because she had been "legally declared" as "mentally ill."

In the Court of Appeals, Appellant cited Transcript pages 2-11 and 3-115 to support this statement. Page 2-11 of the transcript, which is the testimony of Dr. Lagan, concerns June's admission into Longview in 1965. Page 3-115 of the transcript, the testimony of Linda Ellington Hill, concerns attempts to locate a foster home for June in 1967. Such errors cannot be passed off as mere mistakes in citation, and Appellees submit that the "Statement of Facts" provided by Appellant should be disregarded due to the plethora of inaccurate information contained in it.

Many of Appellant's witnesses were social workers who were giving their "opinion" based upon inaccurate or incomplete facts; such as the "fact" concerning the length of June's stay in the Longview Unit School, which was in actuality three years.

Dr. Williams, Assistant Dean of Student Affairs at Case Western Reserve Medical School, testified that the tests he administered to June in 1977 indicated that she had suffered a deterioration of social skills. However, included in the series was one test which had not, at the time, been validated, even in the eyes of its author. Thus, the trial court properly attached little weight to this evidence.

Ms. Bradford, a registered nurse, did not testify, as Appellant suggests, that June's self-concept was damaged by her stay at Longview, but rather stated the general conclusions of a report prepared by the Cincinnati Board of

Health in 1976. This report was admitted by the trial court merely for its "gross conclusions" and does not contain any testimony directly relating to June, contrary to Appellant's suggestions in her Jurisdictional Statement.

Mr. Shipman's testmony is also misconstrued in the Appellant's Statement of Facts. Mr. Shipman did not state that it would take seven to eight years at $8,500.00 per year in educational costs for June to receive an equivalency diploma. Rather, the trial court sustained an objection to testimony that it would take seven or eight years for June to receive a G.E.D. The figure of $8,500.00 was the total sum paid by Jewish Vocational Services for a training program for June in 1975 and 1976. Once again, Appellant has reconstructed testimony to present a set of facts much different from those actually adduced at trial.

Appellant has continually asserted that Longview made no attempt to place June in a foster home. However, June Anderson's testimony, in conjunction with Plaintiff's Exhibit 47, demonstrates that, contrary to this assertion, the Hamilton County Welfare Department was aware of the request by Longview for assistance in locating a foster home.

Finally, Appellant refers on page 14 to the testimony of Bette Gilman, Rosalie Weiser, and Judy Mizrachi, and states that all three "testified as to the detriment and damage to June because of her confinement at Longview." Ms. Weiser actually testified that June responded well to the Jewish

Vocational Service program and was placed in a job at the conclusion of the program. References at trial to the deposition of Ms. Mizrachi indicated that as of February, 1977, June was capable of supporting herself, a conclusion with which Mr. Shipman agreed. Ms. Gilman's testimony, which was replete with absolutes, such as the statement that the sexual molestation of young girls was not a critical or traumatic experience in their lives, was simply given little or no weight by Judge Nichols. Further, none of these witnesses indicated a correlation between any learning problems June may have experienced and her confinement at Longview.

Dr. Stephens conducted a thorough review of the records of June Underwood, several depositions, and reports of various agencies, as well as a personal interview and evaluation of June on November 19, 1977. Dr. Stephens concluded that June was an individual who "possessed a reasonable base of knowledge for daily living." Dr. Stephens found significance in the report of Linda Ellington Hill, which showed areas of June's development as an infant which could be identified as a "developmental lag." A case worker had described June, at the age of twelve months as "unable to sit alone without support . . . not able to pull herself up . . . and was just then beginning to crawl." This suggested to Dr. Stephens that June's development was from twenty-five to fifty percent below that of normal infants. Dr. Stephens noted that unless

intervention occurs very early in such an infant's life, there are effects on learning rates. He concluded with the opinion that June's intellectual and academic functioning at Longview is consistent with what is found in her history prior to her entrance to Longview. Dr. Stephens also stated his opinion that the "placement at Longview was a . . . reasonably good one, was not detrimental to her development."

In its Opinion, the Franklin County Court of Appeals determined that a review of the record supported the findings of the trial court. That court found evidence that Appellant was properly committed, that she received proper treatment and education while at Longview, and that she sustained no damage to her social and academic development. The Court of Appeals further found that the record supported the findings that efforts had been made to place Appellant in a foster home, and concluded that the judgment of the Court of Claims was neither contrary to law nor against the manifest weight of the evidence. The Supreme Court of Ohio dismissed the appeal on the grounds that no substantial constitutional question existed.

I. THIS COURT WILL NOT REVIEW CLAIMS THAT WERE NOT ADEQUATELY PRESENTED IN THE STATE COURTS.

Appellant's "Jurisdictional Statement and/or Petition for a Writ of Certiorari" (hereinafter "Statement") lists twelve "Questions Presented For Review," which all raise a multitude of "federal constitutional questions." These "questions," however, are being raised for the first time before this Court. Appellant's Statement is nothing more than a repetition of the contents of her briefs in the courts below, to which have merely been added these "Questions" containing well-placed catchwords. This attempt to cloak a case involving only factual disputes with an appearance of numerous constitutional violations is clearly insufficient to confer jurisdiction on this Court.

This Court has historically declined to entertain federal constitutional issues raised for the first time in an appeal to review final state court decisions. In Webb v. Webb, 451 U.S. 493 (1981), the Court held that its jurisdiction to examine a judgment of a state court can only arise if the record as a whole clearly demonstrates that a federal claim was adequately presented in the state courts. The Rules of this Court require the party seeking review to specify the stages in the proceedings at which the federal questions sought to be reviewed were first timely and properly raised. (Rules 15(g) and 21.1(h)). Appellant's Statement is obviously deficient in this respect, and offers further proof that the

issues are being raised for the first time in this appeal.

Following a lengthy trial accompanied by numerous findings of facts and conclusions of law, Appellant raised the following Assignments of Error with the Franklin County Court of Appeals:

> I. The Court committed prejudicial error in permitting Judge Rice to rule on the Motion for New Trial.
>
> II. The Court committed prejudicial error when it struck the Title 42 USC, Section 1983, claims.
>
> III. The Court committed prejudicial error as its judgment is contrary to law.
>
> IV. The Court committed prejudicial error as its judgment is against the manifest weight of the evidence.
>
> V. It was error for the trial court to conditionally dismiss, prior to discovery, the Hamilton County Welfare Department as named Defendants (sic) in this suit and to thereafter fail to determine the Status of its employees who are alleged to be agents of the State.
>
> VI. The Court erred to the prejudice of Appellant when it struck the Request for punitive damages from the Demand for Relief.

It is immediately clear that eleven of Appellant's twelve "Questions" for review were never timely presented in the state courts.[1] There is no doubt from the record that the claims presented to this Court were not raised in the courts below. Since the questions presented herein were neither raised nor preserved below, Appellant has waived any right to inject this decade-old litigation with any new issues before

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1. The remaining "Question" is discussed in Part II of Appellee's argument, infra.

this Court. The issues raised below by Appellant merely involve questions of evidence and factual findings. Her contentions were based on several alleged violations of state law. As noted by the Court of Appeals, the record of the trial court contained sufficient evidence to support the following findings and conclusions:

> That plaintiff June Underwood was properly committed by the Probate Court to Longview State Hospital; that she received proper treatment and education while at the hospital; and that she sustained no damage to her social and academic development as a result of any improper act on the part of Longview State Hospital or any other state agency. Efforts were made to find foster placement for plaintiff, and she received education until her condition became such that she could no longer profit from further instruction in an organized school setting.

All of these actions by Appellee complied with applicable state law. Since Appellant has not claimed that any of these laws were repugnant to the Constitution or any laws of the United States, her Jurisdictional Statement must be dismissed. Alternatively, if this Court were to consider the Statement as a Petition for a Writ of Certiorari, it is clear that no title, right, privilege or immunity granted by the Constitution was violated.

II. A LIMITED WAIVER OF SOVEREIGN IMMUNITY BY A STATE IS NOT VIOLATIVE OF THE EQUAL PROTECTION OR DUE PROCESS PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

Appellant's third "Question" for review concerns the trial court's dismissal of that portion of the Complaint alleging violations of her "Constitutional and Civil Rights". Paragraph 18 of the Complaint filed in this matter reads as follows:

> The negligence and/or willful and/or wanton and/or arbitrary behavior of the Defendants, with no justifiable basis, acting individually, and/or conspiratorially, and/or with total disregard for the constitutional, statutory, and civil rights of the Plaintiff, has resulted in severe personal injuries, detriment and deprivation of constitutional and civil rights, with permanent and continuing injury.

Although no mention of 42 U.S.C. §1983 was made in the Complaint, the Court assumed that counsel for Appellant had "in mind" a claim for recovery under that statute. The courts below rejected Appellant's argument that the Ohio Court of Claims Act rendered the State the alter ego of state employees for purposes of maintaining this type of civil rights claim. Rather, as the Court of Appeals noted, such claims could only be pursued against the employees themselves and not in the Court of Claims, as "the only defendant in original actions in the Court of Claims is the State." Section 2743.02(E), Ohio Revised Code.

The issue raised by Appellant is not reviewable by this Court as no federal question is involved. The law is well established (1) that a state can preclude the bringing of

§1983 actions against it, and (2) that the decision to only allow certain types of claims to be filed against the sovereign does not violate equal protection.

With respect to the first point, it is clear that states may limit the waiver of sovereign immunity, and, as this Court has held, 42 U.S.C. §1983 does not override a state's Eleventh Amendment immunity. Quern v. Jordan, 440 U.S. 332 (1979). The State's interest encompasses both whether it may be sued and where it may be sued. Pennhurst v. Halderman, 52 L.W. 4155 (1984). Thus, the State of Ohio's decision not to permit §1983 actions to be brought against it is on firm legal ground.

As regards the second point, since this Court's decision in Palmer v. Ohio, 248 U.S. 32 (1918), it has been well settled that the question of state governmental immunity is not one for review by this Court. That case established that the right of individuals to sue a state cannot be derived from the Constitution or laws of the United States but can only come from the consent of the State, no federal right being involved.

The equal protection clause of the fourteenth amendment does not require complete parity in classificatons established by a statutory scheme. This Court has held that "where rationality is the test, a state does not violate the Equal Protection Clause merely because the Classification made by its laws are imperfect." Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 316 (1976). States are not limited to an

"all or nothing" approach, since the equal protection clause does not require states to "choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge v. Williams, 397 U.S. 471, 485 (1970). Assuming, arguendo, that a class of plaintiffs collaterally results from the provisions of the Ohio Court of Claims Act, such a classification does not trammel fundamental personal rights - an individual does not have a fundamental right to sue a State [Palmer, supra] - and is not drawn upon inherently suspect distinctions such as race, religion, or alienage. Therefore, any classification created by a limited waiver of sovereign immunity does not violate the "reasonable relationship" test expressed by this Court in City of New Orleans v. Dukes, 427 U.S. 297 (1976).

As this Court held more than one hundred years ago in McElrath v. U.S., 102 U.S. 426, 440 (1880):

> The Government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and rules of practice to be observed in such suits. It may restrict the jurisdiction of the Court to a consideration of only certain classes of claims against the United States.

This principle remains valid today. No denial of due process or equal protection exists as a result of a partial waiver of governmental immunity. As such, Appellant's case presents no substantial question not previously decided by this Court.

CONCLUSION

The questions presented by Appellant were not raised or preserved in the Courts below. Further, this case presents no substantial question not previously decided by this Court.

Since the questions upon which this cause depend are so unsubstantial as not to need further argument, it is respectfully submitted that this Court should dismiss the appeal, affirm the decision of the lower courts, or, if appropriate, deny the petition for Writ of Certiorari.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

STEPHEN P. SAMUELS, Chief
Court of Claims Section
State Office Tower, 17th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-7447

COUNSEL FOR APPELLEES

On Motion With Counsel:

MARK T. D'ALESSANDRO
Assistant Attorney General
Court of Claims Section
State Office Tower, 17th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-7447

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To Dismiss Or Affirm was served by regular U.S. Mail, postage prepaid, this 16 day of March, 1984, to the following Counsel for Appellant:

MARLENE PENNY MANES
914 Main Street
Suite 200
Cincinnati, Ohio 45202

JAMES RIMEDIO
817 Main Street
4th Floor
Cincinnati, Ohio 45202

STEPHEN P. SAMUELS

CERTIFICATION OF MAILING

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

Stephen P. Samuels, being duly sworn, states that he is a member of the Bar of the Supreme Court of the United States, and hereby certifies that to his knowledge the original of Appellee's Motion To Dismiss or Affirm was mailed to the Clerk of this Court, postage prepaid, this 16 day of March, 1984.

STEPHEN P. SAMUELS

Sworn to before me and subscribed in my presence on this 16th day of March, 1984.

NOTARY PUBLIC
Attorney at Law
My Commission does not Expire.